NO. 48531-1-II

COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION II

LEVI MYHRE, a minor, by and through his Guardian *ad Litem*, WILLIAM L.E. DUSSAULT,

Appellant,

v.

LAURA HAMILTON, individually and her marital community; LAURA HAMILTON LICENSED MIDWIFE, a Washington business, et al.,

Respondents.

APPELLANT'S REPLY BRIEF

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1. The trial court erred in admitting Hamilton's natural forces of labor theory, because it does not satisfy *Frye*.

The trial court first erred in admitting Hamilton's natural forces of labor theory, because it is novel science that should be deemed inadmissible under *Frye*. *Frye v. U.S,* 293 F. 1013 (App. D.C. 1923). To admit scientific evidence, the evidence must satisfy both the *Frye* standard and ER 702. *Carlton v. Vancouver Care, LLC*, 155 Wn. App. 151, 161, 231 P.3d 1241 (2010). Washington appellate courts review a trial court's *Frye* ruling de novo. *Id.* Washington courts consider, "(1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community." *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

In our courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). If there is a significant dispute among qualified scientists in the relevant scientific community, then the evidence *may not* be admitted. *State v. Gentry*, 125 Wn.2d 570, 585-86, 888 P.2d

1105 (1995) (emphasis added). Unanimity is not required, however. *State v. Copeland*, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996). The *Frye* test involves, by design, a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that "pseudoscience" is kept out of the courtroom. *State v. Copeland,* 130 Wash.2d 244, 259, 922 P.2d 1304 (1996). Error with prejudice can be grounds for reversal. *See Brown v. Spokane County Fire Prot. Dist. No. 1,* 100 Wn.2d 188, 196, 688 P.2d 571 (1983).

The court erred, because there is simply no methodology generally accepted in the scientific community supporting a finding that rupture or avulsion of the brachial plexus can be caused by the natural forces of labor. Hamilton argues this is "beside the point" and cites *Anderson v. Akzo Nobel Coatings, Inc.,* 172 Wn.2d 593, 260 P.3d 857 (2011), in support. *Resp. Br. at 31-33.* She also argues that L.M. "ignores the fact that there is no medical literature … establishing that avulsions of the brachial plexus nerves ***cannot*** be caused by the forces of labor." *Resp. Br. at 31.* In *Anderson*, the Supreme Court allowed the plaintiff's causation evidence, under *Frye*, because it "tended to show it is generally accepted by the scientific community that toxic solvents like the ones to which Anderson was exposed are fat soluble, pass easily through the placenta

and dissolve into the amniotic fluid inside the uterus, and may damage the developing brain of a fetus within the uterus." *Anderson*, 172 Wn.2d at 610. The court rejected the defendant's argument that the plaintiff must establish general acceptance of "the specific causal connection between the specific toxic organic solvents to which she was exposed and the specific polymicrogyria birth defect." *Id.*

But, contrary to Hamilton's assertions, L.M. is not asking for general acceptance of each discrete and specific part of Hamilton's experts' opinions. Rather, L.M. is challenging the fact that her experts could not establish that endogenous forces can even cause the type of injuries he suffered. The evidence presented does not show that maternal forces can cause avulsions, the literal ripping of the nerve from its socket, much less that they can show rupture/avulsions to all five nerve roots.

Unlike in *Anderson*, in which the mechanism causing injury was established and that mechanism has been linked to injuries similar to the one its plaintiff suffered, no such mechanism has ever been shown to cause nerve avulsions here—the evidence simply does not show endogenous forces can cause brachial plexus avulsions absent the application of traction.[1] And this is not for lack of trying; even Hamilton

[1] *See App. Br. at 14-20.* While Hamilton refers to this analysis as "quibbling [that] goes to the weight not the admissibility of the experts' opinion testimony," *Resp. Br. at 37*, it demonstrates that study after study fails to show endogenous forces can cause avulsions.

has failed to present evidence that brachial plexus avulsion injuries can be caused by natural forces. To the contrary, in his trial testimony, L.M.'s expert Dr. Howard Mandel—a fellow of the American College of Obstetrics who has delivered over 10,000 babies during his career—told the jury that despite researching the issue, he could not find a study showing natural forces can cause brachial plexus avulsions. 10/21 RP (Mandel) 4:20-7:12, 90:13-19. Dr. Mandel also opined that if maternal forces could unilaterally cause an avulsion "somebody would want to report it because they would be the first person to report something. It would be kind of intellectually important in our field." 10/21 RP (Mandel) 99:21-100:5.

While the methodology supporting the defense experts' theory could be sound for a simple stretch injury, the lack of any supporting evidence demonstrating more-serious avulsion injuries should preclude a finding that it is generally accepted in the scientific community for that purpose. Indeed, even defense expert Dr. Elizabeth Sanford opined that "more research is needed [to determine] whether [a]vulsion is any different than just a stretching." CP 1468. Because there is no general acceptance in the scientific community regarding the methodology

underlying avulsion injuries,[2] the court should not have deemed Hamilton's theory permissible under *Frye*.

Hamilton's argument that L.M. has failed to point to literature concluding avulsions cannot be caused by natural forces confuses the issues. Under *Frye*, the court must determine a novel science generally accepted in the scientific community; the plaintiff is not required to prove the novel science untrue. This is a mere distraction from the main point—there is no evidence supporting the notion that maternal forces alone can cause avulsions.

Reversal is warranted here because the trial court's decision to allow the maternal forces of labor theory prejudiced L.M. on the eve of trial. Hamilton argues that because nonliability was found, the court's admission of forces of labor causation was not prejudicial because proximate causation was never reached. *Resp. Br. at 39.* However, even when a jury reaches a non-negligent verdict, previous erroneous court rulings and instructions can still affect a jury in a non-harmless (and thus reversible) way. *See Bordynoski v. Bergner,* 97 Wn.2d 335, 342-43, 644 P.2d 1173 (1982). Hamilton's reasoning ignores the fact that the forces of labor theory was inextricably intertwined with negligence in this particular

[2] See, for instance, the studies referenced by L.M. in his initial appeal brief. *App. Br. at 20.*

case: the theory provided the jury another explanation of how L.M.'s injuries arose. This is not too dissimilar to the comparative negligence/negligence distinction in *Bordynoski*. *See id.* Without its admission, it is very likely the jury would have found Hamilton negligent, particularly given the extensive testimony that traction can cause brachial plexus injuries and the dearth of alternative explanations for L.M.'s injuries. Accordingly, L.M. was prejudiced by the theory's admission notwithstanding the jury's non-negligent verdict.

In sum, the trial court erred by determining that the natural forces of labor theory was admissible under *Frye*. This error prejudiced L.M.'s case and warrants reversal.

2. Hamilton's natural forces theory should have also been excluded under ER 702.

Although the natural forces theory should have been excluded under *Frye* alone, its admission simultaneously violated the principles of ER 702. The admission of expert testimony is governed by ER 702, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *See also Carlton,* 155 Wn. App. at 161. Expert testimony is admissible under ER 702 where the testimony would be helpful to the trier of fact. *See Riker*, 123 Wash.2d at 364. The helpfulness test subsumes a relevancy analysis. *Id.* (quoting *State v. Reynolds*, 235 Neb. 662, 683, 457 N.W.2d 405, 419 (1990)).

In making its determination, the court must proceed on a case-by-case basis. *Id.* Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case." *Id; see also State v. Maule*, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983). In *Maule*, the court determined that an expert's theory "was not shown to be

supported by accepted medical or scientific opinion," and therefore did not assist the trier of fact in accordance with ER 702.

In this case, Hamilton's natural forces of labor theory was unhelpful to the trier of fact because the current state of scientific knowledge contradicts it. The record shows that no study has linked maternal forces to ruptures/avulsions of the brachial plexus, and no direct evidence was presented showing that these forces caused L.M.'s injuries. Thus, the natural forces theory fails both *Frye* and ER 702, and warrants reversal.

3. Dr. Allan Tencer's testimony should have been excluded as unhelpful under ER 702.

The trial court also erred by qualifying Dr. Tencer as a biomedical engineering expert in this case. "The admissibility of expert testimony under Rule 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact." 5A Karl B. Tegland, Wash. Prac., Evidence § 288, at 380 (3d ed. 1989); *see In re Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993). An expert must stay within the area of his expertise. *Queen City Farms v. Central Nat'l Ins.*, 126 Wn.2d 50, 102, 882 P.2d 703 (1994); *see, e.g., Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50-51, 738 P.2d 665 (1987) (trial court did not err in excluding testimony of engineer who had almost no

experience with reverse engineering of the type needed). The admissibility of expert testimony must be determined on a case-by-case basis. *See Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 358, 333 P.3d 388 (2014). A trial court's decision concerning the admissibility of evidence is reviewed for an abuse of discretion. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). A trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds, such as a ruling contrary to law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Dr. Tencer was improperly qualified as an expert, because he lacked any independent knowledge or experience as a biomedical engineer with respect to brachial plexus injuries on the process of childbirth. Instead, he is an orthopedics professor, whose expertise is spinal biomechanics. Dr. Tencer's knowledge of the spine undoubtedly qualified him for many of the car crash cases in which he has been a defense expert. But, his expert knowledge of the spine does not qualify him to render opinions on the biomechanics of the nervous system and birthing process, particularly in newborns. Indeed, Dr. Tencer is no more qualified to provide information on brachial plexus injury biomechanics than would be an expert of podiatric biomechanics. While some biomechanic engineers are clearly well-qualified to act as an expert in nerve damage cases, Dr.

Tencer's lack of experience in that area should have led to his preclusion from testifying. His inexperience with the biomechanics of childbirth should have also led to his exclusion.

The trial court abused its discretion by allowing Dr. Tencer to testify as to the purported endogenous forces upon L.M. when no such data exists to actually measure them. ER 702 excludes testimony where the expert fails to adhere to reliable methodology. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918-19, 296 P.3d 860 (2013). Selective sampling, or failure to account for unfavorable data to create a false impression to the jury, can show an expert's methodology unreliable. *See id.*

In her response, Hamilton argues that Dr. Tencer's conclusions were the product of a reliable methodology—he relied upon "published biomechanical studies done by other biomechanical engineers," and that said studies have been relied upon and cited in medical literature. *Resp. Br. at 42*. In his declaration, Dr. Tencer pointed to a 2000 study applying a mathematical model to prove that endogenous forces are 4 to 9 times greater than clinician-applied forces. CP 2375. He also states in his declaration that "[b]iomechanical measurements and calculations demonstrate that the endogenous forces are greater than exogenous forces

during the birth process." CP 2743. Dr. Tencer cited this data in his trial testimony. 10/27 RP (Tencer) 35:5-10.

But Dr. Tencer's mathematical equations are, at best, misleading. Indeed, Dr. Tencer does not and cannot cite a study determining the actual endogenous and exogenous pressures, opposed to mathematical modeling, in either his declaration or trial testimony. In his declaration, his only calculations of endogenous forces are mathematical. His citation to studies of exogenous force, ranging "to about 100N in actual births and up to 250 N in simulations" is also suspect, as explained in L.M.'s initial brief. *See App. Br. at 27-28.* His reliance on mathematical models rather than actual data is furthermore troubling given his lack of experience in childbirth physics/biomechanics prior to this case.

Dr. Tencer's trial testimony is most telling. The thrust of his testimony—based off the 2000 study—was that both internal and external forces have an effect, "but it seems like the internal force has a greater effect." *See* 10/27 RP (Tencer) 35:9-10. However, when pressed by L.M.'s counsel on cross-examination, Dr. Tencer discredited the study, which stated that no such data has ever been actually measured. L.M.'s counsel asked Dr. Tencer whether he would agree with its conclusion that, "there are no data to quantify the threshold pressures needed to induce traction versus compression related nerve injury." CP 3204; 10/27 RP (Tencer)

28:18-23. Dr. Tencer evaded this question by stating, "See, this was published in 1999. And, you know, science moves forward ... So I think that for at that point in time that was probably correct. At this point in time there's probably more data around." 10/27 RP (Tencer) 18:24-19:4. After a follow-up, Dr. Tencer stated "you know, science is all about new knowledge, so I'm not sure that statement's completely accurate for this point in time." 10/27 RP (Tencer) 29:9-11.

But, Dr. Tencer presented no evidence of newer studies that work to discount that conclusion in either his trial testimony or declaration. Similarly, his caution against using a 15-year old study did not preclude him from basing his opinions that endogenous forces are greater than exogenous ones off that same study. The study even undervalued itself as a "mathematical exercise ... [that] can only crudely examine this complex issue of forces and pressures related to the shoulder dystocia event." CP 3200. In fact, generally accepted medical science has not determined an estimate of the force needed to cause a nerve rupture. *See* CP 3202.

Dr. Tencer's testimony should have been excluded, because it is no different than the excluded testimony in *Lakey*. Like in that case, which held that the expert "selectively sampled data within one of the studies he used ... [which] created an improper false impression about what the study actually showed," *See Lakey,* 176 Wn.2d at 921, Dr. Tencer actively

discredited part of the 1999 study—by saying its age precludes finding that no data can quantify threshold pressures of injury—while simultaneously using the findings of that study as a primary basis for his opinion. This selective sampling of a single source's conclusions is not helpful to the jury and shows that Dr. Tencer deliberately created a false intention as to its findings.

Dr. Tencer's testimony is also like that in *Lakey*, because the scientific evidence simply does not show that the natural forces of labor can "cause the rupture and avulsion of a brachial plexus," as he stated at trial. 10/27 RP (Tencer) 22:6-9. In *Lakey*, the court determined that an expert was properly excluded when he failed to consider studies that contradicted his claims. In this case, despite testifying that natural forces can cause a rupture and avulsion similar to the injuries L.M. suffered, Dr. Tencer testified on cross-examination that the 2014 ACOG's conclusion that "[a]n estimate of the force needed to cause a nerve rupture cannot be directly established" was "fair." 10/27 RP (Tencer) 29:25-30:2. Dr. Tencer's repeated assertions that endogenous forces are stronger than exogenous ones and can cause nerve damage constitutes impermissible picking-and-choosing of scientific research that was disallowed in *Lakey*. The general scientific community simply does not know whether maternal

forces can, by themselves, cause avulsions, notwithstanding spinal biomechanics expert Dr. Tencer's opinion to the contrary.

Dr. Tencer's testimony should have also been excluded as—at its essence—a medical opinion he was not qualified to make. Dr. Tencer has been retained frequently as an expert defense witness in personal injury cases, and the admissibility of his testimony has often been challenged.[3] In *Johnston-Forbes*, the Supreme Court affirmed the trial court's decision to allow Dr. Tencer's testimony in a car crash case on several grounds: the court limited Dr. Tencer's testimony, he "did not opine on the injuries Johnston-Forbes may have sustained," and he "repeatedly stated during his testimony that he was not testifying about [the plaintiff's] injuries." *See* 181 Wn.2d 346. In *Stedman*, in which Dr. Tencer was properly excluded by the trial court, Dr. Tencer emphasized he was speaking from a biomechanical rather than medical perspective, and "disavowed any intention of giving an opinion about whether Stedman got hurt in the accident." 172 Wn. App. at 14. Yet, the court held that his "clear message was that Stedman could not have been injured in the accident because the force of the impact was too small." *Id.* Dr. Tencer's conclusion "was

[3] *See, e.g., Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014); *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013); *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012); *Maele v. Arrington*, 111 Wn. App. 557, 562-64, 45 P.3d 557 (2002).

exactly that: the forces generated by the impact were not sufficient to cause the type of injuries Stedman was claiming." *Id.* The appellate court affirmed the ruling by determining his testimony was more misleading than helpful. *Id.* In *Berryman*, the court affirmed exclusion of Dr. Tencer's testimony stating his opinion that, "The forces acting on Ms. Berryman's body in this accident appear to be within the range of forces experienced in daily living," consistent with *Stedman. See Berryman*, 177 Wn. App. 644. The clear message of Dr. Tencer's testimony here was that L.M.'s injuries were the product of endogenous forces and not clinician malpractice. Taken in context, Dr. Tencer's purpose was to establish that this injury could have resulted from endogenous forces. Although he did state that he was "not specifically" opining on L.M.'s injuries, he did state that brachial plexus injuries—like the one L.M. sustained—can result from endogenous force stretching. 10/27 RP (Tencer) 26:6, 22:6-9. Even if Dr. Tencer's testimony was veiled in biomechanical garb, the "clear message" of his testimony was to show plaintiff's medical malpractice allegations did not cause L.M.'s injuries. Indeed, his declaration stated, "[w]ithout my testimony, the jury is left to consider two opposing medical opinions without an objective basis to differentiate between them and to determine the truth." CP 2378. Because his purpose was to influence the jury on the issue of medical causation, the court should have excluded his

testimony as improper medical opinion testimony. Its failure to do so constitutes a reversible abuse of discretion.

4. The trial court erred by changing venue to Lewis County.

Judge Schubert of the King County Superior Court erred by changing this case's venue to Lewis County. Change of venue decisions are reviewed for an abuse of discretion. *Hickey v. City of Bellingham*, 90 Wn. App. 711, 719, 953 P.2d 822 (1998). A court may change the place of trial if there is satisfactory proof that there is reason to believe that an impartial trial cannot be had therein. *See* RCW 4.12.030(2). A court may also change venue if evidence shows that the convenience of the witnesses or the ends of justice would be forwarded by the change. RCW 4.12.030(3). When a litigant does not immediately seek appellate review of a venue decision, he must show he was prejudiced by reason of the county in which the trial was held. *See Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 578, 573 P.2d 1316 (1978).

L.M. reasserts that venue was improper in Lewis County given Ms. Hamilton's extensive ties to community members there. Ms. Hamilton is a Lewis County native who attended high school and community college in Lewis County, and who set up her professional practice therein. Ms. Hamilton estimated on the stand that of the over 3,500 babies she has delivered during her career, "maybe 3,000" of them were born in Lewis

County. 10/23 RP (Hamilton) 105:3-8. Given that Lewis County only has approximately 75,000 inhabitants, Ms. Hamilton has both directly played an integral role in the lives of many of the county's residents, and has indirectly affected many more. The jury's non-negligent verdict raises a serious question as to whether L.M. received a fair trial given the demographics of the county.

Lewis County was also the improper venue, because it was more inconvenient to witnesses and did not serve the interests of justice. L.M.'s guardian ad litem, the only plaintiff, was in King County, and neither L.M. nor his parents objected to litigating in King County. Likewise, several of the witnesses at trial lived or worked in King County; for example, Dr. Stephen Glass practices in King County, 10/22 RP (Glass) 5:22-24, and Dr. Tencer lives in Seattle, 10/27 RP (Tencer) 4:18. L.M. should have had an opportunity to bring his claims in the court of his choosing, and the trial court erred by transferring venue to Lewis County. By transferring the claim, the trial court abused its discretion and prejudiced L.M., requiring reversal.

5. The trial court erred in refusing Dr. Tse's testimony as cumulative.

The trial court furthermore committed reversible error by excluding Dr. Tse's testimony about causation as cumulative under ER 403. Generally, the exclusion of evidence which is cumulative or has

speculative probative value is not reversible error. *Henry v. Leonardo Truck Lines, Inc.*, 24 Wn. App. 643, 645, 602 P.2d 1203 (1979). However, Dr. Tse's testimony would not have been cumulative if allowed—he was the only witness who actually saw the damage done to Levi's brachial plexus nerves and could reasonably opine as to what he believed caused the damage.

The court also erred when it excluded Dr. Tse's causation testimony because he had not "studied that." 10/21 RP (Tse Argument) 8. Although he admitted he had not "sought extensively looking for reasons for" brachial plexus injuries in newborns, Dr. Tse's experience informs him as to the causes of traction. *See* 10/21 RP (Tse Argument) 7. Later in his deposition Dr. Tse testified that brachial plexus damage in newborns is most commonly caused by traction. 10/21 RP (Tse Argument) 6:10-11. Dr. Tse, as a plastic surgeon in Seattle Children's Hospital's brachial plexus clinic, is as well-qualified as anybody to provide expert opinion in this matter. *See* CP 19. Accordingly, the trial court erred in excluding his causation testimony as both cumulative and by determining he was not qualified to provide it.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court and remand to the King County Superior Court for a new trial. The Court

should find that Hamilton's maternal forces of labor theory violated *Frye* and ER 702 because its methodology is not generally accepted in the scientific community. Similarly, it should find the trial court abused its discretion by allowing Dr. Tencer's testimony that was unqualified, not helpful to the jury, and that had a clear message of a medical opinion. Furthermore, the Court should rule that the trial court's decision to transfer venue and preclude Dr. Tse's causation testimony were both reversible abuses of discretion.

Respectfully submitted this 22nd Day of August, 2016.

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The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, I caused to be served upon the following individuals via the methods indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 22, 2016.

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